Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF WASHINGTON, *et al., Appellants,*

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al., Appellees.*

On Appeal From The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF AMICI, STATES OF ARIZONA, KANSAS, NEBRASKA, AND UTAH IN SUPPORT OF JURISDICTIONAL STATEMENT

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INTEREST OF THE AMICI

The issue of mandatory bussing of children away from their neighborhood school is now the subject of a nationwide debate. The intensity of that debate reflects its importance. How it is resolved will surely affect the degree of public support for a school system which cannot effectively function without that support. It is, after

all, a *public* school system that is involved, with all that entails.

To what extent is that debate a useless exercise, even when, as in this case, it addresses bussing which is not constitutionally required? What role, if any, does the Equal Protection Clause leave to the public in resolving that debate?[1] These are the central questions presented by this appeal.

If the decision below were to be summarily affirmed, and thereby become the decision of this Court, the voters in all states might well be precluded from ever exercising their judgment — either directly through the ballot box, as here, or through their elected representatives in the legislature — in the area of school desegregation or, for that matter, in any other similarly sensitive area.

Further, the decision below appears to stand for the proposition that *any* legislative attempt, federal or state, to curtail forced bussing must fall, on the grounds that it would necessarily create an impermissible racial classification. Thus, the decision adds an element of confusion which lessens significantly the likelihood that the nation as a whole, or any state within it, will ever see implemented the neighborhood school assignment policy established by Congress in the Equal Educational Opportunities Act of 1974 (20 U.S.C. 1701, *et seq.*, and reaffirmed by the very initiative measure which is the subject of this appeal.

For the reasons set forth herein, it is extremely important to Washington's sister states that this Court now

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[1] The debate rages even on the academic level. See, *Bell,* Book Review, 92 H.L.R. 1826 (1979).

set this appeal down for full briefing and argument on its merits.

STATEMENT OF THE CASE

Initiative Measure No. 350, which as adopted by the voters of the state of Washington in 1978 by a margin of almost two-to-one, is not complex.[2] It begins, in §1, with a blanket prohibition of mandatory assignment of students away from their nearest or next nearest school:

> ". . . no . . . school district . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . ."

Three exceptions are then provided in §1. The prohibition does not apply:

> "(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;
>
> "(2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or
>
> "(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."

These exceptions, it will be observed, all focus upon the educational, health, and safety needs of the particular student, and the inability of a particular neighborhood school to meet those needs.

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[2] The full text of Initiative 350 is set out at J.S.App. F-2 through F-4.

Sections 2, 3 and 4 further explain the terms and rules contained in §1. Section 5 makes it explicit that establishment of specialized enrichment programs and voluntary bussing for attendance at these programs, are in no way precluded.

Section 6 contains another important exception to the blanket prohibiton of mandatory bussing:

> "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools."

The last section contains a standard severability clause, requiring that the invalidity of any provision of the Initiative, or the invalidity of its application to any person or circumstance, shall not affect the remainder of the Initiative, or its application to other persons or circumstances.

In a challenge brought by three school districts, the District Court invalidated the Initiative *in toto*, as applied to all of the some 300 school districts in the state. And the Court of Appeals affirmed the District Court, finding that the Initiative constituted, on its face, an impermissible racial classification.

There seems to be no dispute among the parties that the drafting and filing of the Initiative — the first steps in submitting it to the voters statewide — were prompted by the adoption, beginning with the 1978-79 school year, of a mandatory bussing program by the Seattle School District, designed to achieve greater racial balance in that District's schools.

The Initiative was approved, not only by a majority of the voters in the Seattle School District, but by a majority in every one of the State's 39 counties as well.

REASONS WHY THE FEDERAL QUESTIONS PRESENTED ON THIS APPEAL ARE SUBSTANTIAL

I. The Mandatory Bussing Question.

The major issue presented in this appeal is too important to be left in a state of legal confusion. If neither the voters nor their elected representatives have a role in resolving the debate over mandatory bussing of children away from their neighborhood schools, they should know why the Equal Protection Clause requires this result. If, on the other hand, such a result is not required, that too should be made clear.

The decisions of other lower courts on this issue simply cannot be reconciled with the decision of the Court of Appeals here. This appeal thus affords an important opportunity to dispel the confusion, and thereby take a significant step forward in the development of Equal Protection analysis.

A. The Differing Results In Several Recent Major Cases Involving Race-Connected Legislation Have Created Confusion As To The Legal Criteria For Determining Illicit Legislative Classifications, Thereby Heightening The Importance Of This Appeal.

At pages 19-21 of its jurisdictional statement, the State of Washington succinctly poses a critical question. As there pointed out, the specific language of the Washington Initiative is nearly identical to that used by Congress when it enacted the Equal Educational Opportunities Act of 1974 (20 U.S.C. §1701, *et seq.*) The federal statute is unquestionably intended to inhibit the use of forced bussing even where *de jure* segregation has been found to exist and there is a constitutional necessity to cure its effects. By contrast, the Washington State

legislation explicitly subordinates its own central policy to these same constitutional imperatives. Nevertheless, it is the federal statute which has been repeatedly upheld; while, ironically, it is the Washington law which has been, so far, declared unconstitutional. See, *Brown* v. *Califano*, 627 F.2d 1221 (D.C. Cir. 1980).

In *Brown*, the Court of Appeals for the District of Columbia upheld the parallel federal legislation in the face of a broad-based constitutional challenge, never indicating at any point in its opinion that the legislation in question created some sort of racial classification. By way of contrast, the Ninth Circuit based its affirmance of the District Court decision in this case solely on the ground that the parallel state legislation constituted an improper racial classification under *Hunter* v. *Erickson*, 393 U.S. 385 (1969) and *Lee* v. *Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970).

These differing results between circuits are confusing enough. The confusion is compounded, however, by the result reached in the recent case of *Crawford* v. *Board of Education of Los Angeles*, 113 Cal.App. 3d 633, 170 Cal.Rptr. 495 (1980), aff'd _____ Cal.App.3d _____, _____ Cal.Rptr. _____ (1981). In *Crawford*, California courts upheld a perfectly obvious attempt by the voters to inhibit the use of forced bussing to achieve racial balance in the absence of a federal constitutional requirement for doing so — precisely the same objective as was sought by the Washington voters here. The California voters did so by adopting a constitutional amendment expressly limiting state courts to the exercise of powers in school desegregation cases which are no greater than those exercisable by the federal courts in like circumstances. The measure in California was and still is simply an inhibition upon the power of one class

of state institutions — the state courts — to implement a program of forced bussing for the purpose of racially balancing California's public schools. Following the California Supreme Court's decision in *Crawford*, the school board in Los Angeles promptly dismantled that city's mandatory bussing program in response to the expressed will of the electorate. By contrast, a similar, large-scale bussing program goes on unimpeded today in Seattle, notwithstanding the expressed will of the electorate in Washington state.

Again, the importance of the question presented seems obvious. The States of Washington and California should be entitled to legislate equally in the area of school desegregation. So, too, should other states in the Union. Without a definitive resolution of this appeal, it will remain impossible for other states to determine the extent to which they are allowed to legislate in this field.

B. The Result Reached By The Court Of Appeals Is Based Upon A Fundamental Misconception As To The Proper Criteria For Determining An Unconstitutional Race-Dependent Decision.

The finding by the Court of Appeals that Initiative 350 constitutes an impermissible racial classification rests, we believe, upon a fundamental misconception as to what the Equal Protection Clause does and does not prohibit under the decisions of this Court. This misconception was succinctly stated by Judge Wright in his dissenting opinion.

> "The difficulty with the majority's analysis, supported in part by dictum in *Lee* v. *Nyquist*, . . . is that it confuses treatment of racial problems with treatment on the basis of race. The latter, of course, is suspect. But 'racial' problems, such as school desegregation, must be dealt with in terms of the

> specific problem and specific solutions. The state does not create a classification on the basis of race in so doing." 633 F.2d at 1353.

Because the consequences of this confusion and misconception by the majority are so serious, the critical point made by Judge Wright merits further examination.

The Equal Protection Clause embodies, we believe what Professor Brest has called the "antidiscrimination principle."

> "Stated most simply, the antidiscrimination principle disfavors race-dependent decisions and conduct — at least when they selectively disadvantage the members of a minority group. By race-dependent, I mean decisions and conduct (hereafter, simply decisions) that would have been different but for the race of those benefited or disadvantaged by them. . . .[3]

The paradigm of a race-dependent decision is, of course, a statutory racial classification. Such a statute dictates, expressly, that there will be different results for members of different races, by reason of their race. Under such a classification, one's race determines what school one shall go to, what parks one shall use, what part of a bus one shall sit in, and so on. The causal relationship between race and result is thus embodied in the statute itself.

But there may well be race-dependent decisions which do not involve racial classifications at all. Although such decisions "would have been different but for the race of those benefited or disadvantaged by them"[4] the causal relationship between race and result is

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[3] P. Brest, *In Defense of the Antidiscrimination Principle*, 90 H.L.R. 1, 6 (1976).

[4] *Id.*

not found on the face of the statute itself, but must be found, at least in part, from facts and circumstances extrinsic to the statute. An example would be a statute shutting down all public schools, and thereby depriving all children, of all races, of a public education. If the purpose was to avoid racial integration, the decision embodied in the statute would be race-dependent. *Cf.*, *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964). If, on the other hand, the decision was the result of the state simply running out of money, it would not be race-dependent.

As this last example shows, not all decisions that affect racial minorities — even disproportionately — are race-dependent. Although this was not clear before, it certainly became clear after such cases as *Washington* v. *Davis*, 426 U.S. 229 (1976) and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

As these cases also show, determining whether a decision is race-dependent is not always easy. Determining whether the decision would have been different but for the race of the persons affected is especially difficult when the decision itself is the collective result of many individual decision-makers. But that it may be difficult does not mean that it is avoidable.

Does Initiative 350 embody a race-dependent decision? And even more importantly, what should a court look to in attempting to answer this question?

Does the face of the Initiative itself show a race-dependent decision, by reason of a racial classification? The Initiative surely makes an important classification, between those reasons which justify mandatory bussing and those which do not. The reasons which justify man-

datory bussing fall into two categories. In the first category are reasons which are directly related to the needs of the particular student, and the ability — or inability — of his nearest or next nearest school to meet those needs. See, §1(1)-(3). In the second category are the requirements of the federal constitution itself. See, §6.

All other reasons, under the Initiative, do not justify mandatory bussing. And among those reasons, of course, if the attainment of a greater racial balance when such balance is not constitutionally required. But this hardly indicates a racial classification on its face. Indeed, it indicates precisely the opposite, *i.e.*, an intent to adopt a policy that racial classifications will not be made in assigning children to schools.

The Initiative unquestionably is dealing with a racial problem — that of *de facto* segregation. But that, in itself, does not indicate any racial classification. Nor does that, in itself, mean that the decision is race-dependent. One must inquire further as to *why* the decision was made the way it was. That is the simple, but all-important point made by Judge Wright's dissent.

Three final points. First, unlike the city charter amendment involved in *Hunter* v. *Erickson,* 393 U.S. 385 (1969), Initiative 350 in no way impedes the efforts of minority groups to prevent private — or public — race-dependent decisions. The discussion in the Court's opinion in *Hunter*, however, may have been, at least in part, the source of the confusion for the Court of Appeals majority in this case. Although the Akron charter amendment did not constitute a racial classification, in the basic sense that different results were dictated for members of different races, the Court's discussion does

speak of the charter amendment as constituting a racial classification. See, 393 U.S. at 389-391.

But the result in *Hunter* is best explained and understood, we believe, in the terms used by Justice Harlan in his concurring opinion, in which he found the amendment invalid by reason of its ". . . clear *purpose* of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." (Emphasis supplied.) 393 U.S. at 395. And that, of course, was legislation which would prohibit race-dependent decisions by private parties in the sale or rental or housing.

Perhaps presaging the later clarification brought about by *Washington* v. *Davis,* Justice Harlan went directly to the question of intent or purpose, without casting his analysis in terms of a racial classification. And he thereby avoided the confusion into which the Court of Appeals majority was lead in its misplaced reliance upon *Hunter.*[5]

Secondly, in determining the validity of Initiative 350, then, there must inevitably be faced the issue which the Court of Appeals majority considered irrelevant, the issue of motivation or intent in adopting the Initiative. Was Initiative 350 a race-dependent decision? Specifical-

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[5] This is not the first time a lower court's reliance upon *Hunter* has been misplaced. In *Valtierra* v. *Housing Authority of San Jose,* 313 F.Supp. 1 (1970), a three-judge district court invalidated, squarely on the basis of *Hunter,* a California constitutional amendment requiring a local referendum on all low-income housing projects. This Court corrected the district court's error in *James* v. *Valtierra,* 402 U.S. 137 (1971). The present appeal affords an important opportunity to give a much needed clarification as to when lower courts should rely upon *Hunter,* on the one hand, and upon *Valtierra* on the other.

ly, did its adoption by the voters rest upon an intent to prevent minority groups from achieving a better education? Or, on the other hand, did it rest upon an intent to preserve the values inherent in a policy of neighborhood schools and upon a judgment that, on balance, mandatory bussing makes little sense educationally for *anyone,* and that accordingly any problem of racial imbalance should be handled by alternative means? In short, was Initiative 350 a race-dependent decision, which would have been made differently if minorities were not involved?

The fact that minorities *were* actually involved, and that the sponsors of the Initiative knew it would affect minorities does not make the decision embodied in Initiative 350 race-dependent. This fact only leads to the question of intent, but does not answer it.

In failing to address that issue of intent, the Court of Appeals' majority made its fundamental error. And the result of that error is what gives this appeal such great importance. The result, again, is that the voters of the state of Washington are precluded from resolving the debate over the wisdom of mandatory bussing, when that bussing is not constitutionally required. We do not believe that the Equal Protection Clause requires this result in the state of Washington or in any other state.

Lastly, the Court of Appeals went on at length in its opinion about the importance of "local control" over educational policy. See, 633 F.2d at 1345-47. The importance of "local control" has also been alluded to in numerous other federal court decisions, including those of this very court. See, *e.g., Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). What is so anomolous about the Court of Appeals' decision here is that, while it emphasizes the importance of local control

(and, perforce, the impropriety of "state" interference with that local control), it ignores the fact that passage of the Washington Initiative represents the most direct local control possible. The exercise of the legislative power through popular initiative *is* local control. By its very terms, the Washington initiative is a flat directive by those vitally concerned with the education of Washington's children — parents of those children and tax-paying residents in local school districts — to Washington school districts telling local school officials how they are to go about assigning students in the absence of a constitutional duty to cure intentional racial segregation. The Court of Appeals has chosen, instead, to characterize these same concerned citizens as "the state," an impersonal political entity interfering in "local" educational matters. That is an absurd characterization which emphasizes the importance of meaningful review by this Court.

II. The Awarding of Attorneys' Fees to Political Subdivisions of the States is of Vital Concern to Amici States and Merits This Court's Plenary Review.

It takes very little effort to appreciate readily the concern of amici over the Circuit Court's treatment of attorneys' fees in this case. The District Court found that this very litigation had already been largely funded by the State of Washington, yet the panel majority held that Court's refusal to order the replenishment, by the state, of *its* funds appropriated to one of *its* political subdivisions for the very purpose of conducting this litigation was "arbitrary and capricious."[6]

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[6] It is important to note here that *only* the school districts themselves, which possess no Fourteenth Amendment rights per se, plus several intervenors whose right to fees are apparently not involved in this appeal, even requested fee awards. No fees were

A greater lack of sensitivity for the states' relationships to their own agencies and subdivisions, and for the integrity of states' legislative appropriation processes, can hardly be imagined. Surely a rule which requires, as a matter of federal law, a state to pay *twice* for litigation which it has, in effect, permitted one of its own political subdivisions (which it has created, funded and empowered to sue) to bring against that state constitutes such an "unwarranted interference in the state's ability to function effectively in a federal system" (see, *National League of Cities* v. *Usery,* 426 U.S. 833 (1976)) that Congress cannot be presumed to have implicitly intended such a result, even in the context of enforcing the Fourteenth Amendment.

The proper disposition of the attorneys' fees issue is of vital importance to all the states. Amici strongly urge this Court to note probable jurisdiction and set that question down for full briefing and argument on the merits.

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sought on behalf of the several private plaintiffs also nominally represented by the school districts' attorneys.

CONCLUSION

The questions raised by the State of Washington are of vital concern to the amici states. Probable jurisdiction should be noted.

Respectfully submitted,

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